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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NO. _____

MARK DAVID NILES,
Petitioner

versus

THE UNIVERSITY INTERSCHOLASTIC LEAGUE, et al.,
Respondents

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For the Fifth Circuit
and Appendices

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QUESTION PRESENTED

Whether the Court of Appeals and District Court erred in their holding that the Plaintiff MARK DAVID NILES, had failed to state a claim upon which federal relief could be granted, where the young Plaintiff had clearly, and in detail plead under oath that he and his guardian family had been the victims of governmental intimidation, coercion, harassment and punishment solely as a result of their instituting this civil rights litigation and testifying and participating therein with vigor in the United States District Court For The Southern District of Texas.

LIST OF INTERESTED PARTIES

Pursuant to Rule 21.1(b), Rules of the Supreme Court, counsel for Petitioner certify that the following is a complete list of all parties in the proceeding in the Court whose judgment is sought to be reviewed and, additionally, all parties and persons believed to be interested in the outcome of this Petition:

1. Mark David Niles, Petitioner.
2. The University Interscholastic League (a component of the University of Texas at Austin), Respondent.
3. Mr. Les Mattinson, Petitioner's former guardian.
4. Dr. Bailey Marshall, Director of the Defendant, UIL, Respondent.
5. Dr. William Farney, Assistant Director of the Defendant, UIL, Respondent.
6. The District III—17 AAAAA Executive Committee, Harris County, Texas.

SUBJECT INDEX

	Page
QUESTION PRESENTED	I
LIST OF INTERESTED PARTIES	II
INDEX OF AUTHORITIES	III
OPINIONS BELOW	2
STATEMENT OF JURISDICTION	2
CONSTITUTIONAL, STATUTORY AND PROCEDURAL PROVISIONS INVOLVED	2
RULE OF THE SUPREME COURT INVOLVED	4
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	7
CONCLUSION AND PRAYER	15
CERTIFICATE	16
APPENDIX A—(Opinion of the Circuit Court)	A-1
APPENDIX B—(District Court's Final Judgment and Memorandum and Order Dismissing the Case upon Defendant's Motion to Dismiss under Rule 12(b)(1) and (6), F.R.C.P.)	B-1
APPENDIX C—(Relevant portions of Plaintiff's last amended Complaint, wherein young Niles detailed the Defendant's harassment, etc.)	C-1

INDEX OF AUTHORITIES

Page

CONSTITUTION

United States Constitution, Amendment I 2
United States Constitution, Amendment XIV 2

CASES

Bell v. Hood, 327 U.S. 678 (1946) 8
DeLoach v. Crowley's, Inc., 128 F.2d 378 (5th Cir. 1942) 8
E.E.O.C. v. Locals 14 and 15 I.U.O.E., 438 F.Supp. 876 (S.D. New York) 10
Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803) 9
Pennsylvania v. Local 542 Int'l Union of Operating Engineers, 347 F.Supp. 268 (E.D. Pa. 1972) 10
Shires v. The Magnavox Company, 432 F.Supp. 231 (E.D. Tenn. 1976) 11
Snow v. Hawkes, 183 N.C. 365, 111 S.W. 621 13
United States v. Diebold, Inc., 369 U.S. 654 (1962) 8
United States v. Farrar, 424 F.2d 936 (5th Cir. 1969) ... 10
Vandenberg v. Newsweek, Inc., 441 F.2d 378 (5th Cir. 1971) 8
Wilson v. Irwin, 144 Ky. 311, 138 S.W. 373 (1911) 11, 12

STATUTES

28 U.S.C. § 1254 2
28 U.S.C. § 1343 ..... 3, 4, 8
28 U.S.C. § 1651 10
42 U.S.C. § 1983 ..... 3, 8, 9, 14
42 U.S.C. § 1985 ..... 2, 3, 8, 9, 14

RULES OF CIVIL PROCEDURE

Rule 12(b)(1) and (6), F.R.C.P. 4, 7, 8

SUPREME COURT RULES

Rule 17, United States Supreme Court 4

SECONDARY AUTHORITIES

17 Am.Jur.2d 18, Contempt § 13 Anno.—Contempt—Forcing Withdrawal—23 A.L.R. 187-189 13

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PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For the Fifth Circuit
and Appendices

To The Honorable Supreme Court of the United States:

MARK DAVID NILES respectfully petitions the Court to grant a writ of certiorari to review the Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit, and to thereafter reverse that decision and the ruling of the District Court and remand the cause to the District Court for all actions not inconsistent therewith.

OPINIONS BELOW

1. The Opinion of the District Court signed and entered on February 4, 1983, is not reported. (See Appendix "B")

2. The Opinion of the Circuit Court is reported in 715 F.2d 1027 (9/30/83) (see Appendix "A").

STATEMENT OF JURISDICTION

Petitioner seeks to review the Opinion and Judgment of the Court of Appeals, under date of September 30, 1983. Statutory jurisdiction is conferred under Title 28 U.S.C., § 1254.

CONSTITUTIONAL, STATUTORY AND PROCEDURAL PROVISIONS INVOLVED

1. United States Constitution, Amendment I, providing relevantly that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people . . . to petition the Government for a redress of grievances."

2. United States Constitution, Amendment XIV, providing relevantly that no ". . . State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of . . . liberty or property, without due process of law; nor deny to any person . . . equal protection of the laws.

3. Title 42, U.S.C. Section 1985.

> * * * (2) If two or more persons in any State or Territory conspire to deter, by . . . intimidation, or threat, any party or witness in any court of the

> United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict . . . in any such court, * * * ; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State . . . with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws; * * * (3) * * * in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

4. Title 42 U.S.C. Section 1983, reading in pertinent part:

> Every person who, under color of any statute . . . custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

5. Title 28 U.S.C. Section 1343, reading in pertinent part:

> * * * The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> (1) To recover damages for injury to his person . . . or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;
>
> (2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights. * * * .

6. Rule 12, (b)(1) and (6), F.R.C.P., wherein the Rule states that a party may, prior to pleading, move for dismissal on the grounds that the court lacks jurisdiction over the subject matter or that the plaintiff has failed to state a claim upon which relief can be granted.

RULE OF THE SUPREME COURT INVOLVED

Rule 17 of this Honorable Court, generally states that the lower courts connected to the case must have decided an important question of federal law which has not been, but should be, settled by this court, and has decided a federal question in a way in conflict with applicable decisions of this Court. Such is the urgent situation at bar.

STATEMENT OF THE CASE

The Circuit Court stated more than once in its opinion that the ". . . gravamen of the complaint here is the denial of the right to participate in interscholastic sports . . ."; however, said court and the District Court totally ignored the young Plaintiff's detailed, sworn assertions of governmental retaliation, coercion, intimidation and harassment aimed at and perpetrated against him and his guardian family solely as a result of bringing, participating in and prosecuting this suit with vigor. Such truthful assertions were contained in Plaintiff's last amended complaint and are just as important as the balance of Plaintiff's causes of action. The Respondents here have wrongfully interfered with the plaintiff's prosecution of this case before the United States District Court, and such tortious acts by the Defendants grew out of and were perfectly connected with the operative facts causing the institution of this suit originally.

As largely related by Justice Jolly of The Fifth Circuit Panel:

> "The plaintiff Mark David Niles was, in 1981, (an honor) student at Stratford Senior High School in the Springbranch, Texas, Independent School District. As a student, Niles participated in various activities, including intervarsity high school football and track. In the fall of 1981 Niles's mother, who had divorced in 1971 and who had been awarded custody of Niles, remarried and moved to California. Niles remained in Texas for the remainder of the fall academic term, however, and played varsity football. In late December 1981, Niles moved to California where he lived with his mother during the spring academic term. In early August 1982, Niles returned to Stratford Senior High School and par-

> ticipated in the football program. During fall 1982, Niles resided with Mr. Les Mattinson, who had been given legal guardianship by Niles's mother.
>
> In November 1982, the Executive Committee of the University Interscholastic League declared Niles ineligible to participate in UIL interscholastic programs pursuant to Article 8 of the UIL constitution which, in essence, requires that a student be a resident of the school district for at least one year prior to participating in interscholastic events. In addition, UIL required Stratford Senior High School to forfeit all of the games in which Niles had participated up until that point. Niles initially obtained a temporary restraining order from the 270th District Court of Harris County, Texas, allowing him to participate in the final regular season football game and overruling the forfeiture of the previous games in which he had played. The following week, on November 11, 1982, Niles took a non-suit in the state court proceeding. * * *"

Mr. Niles filed this action immediately in the United States District Court for the Southern District of Texas and Judge Cire of that Court issued a temporary restraining order against the Defendants relevant to impending events. One week later, a detailed evidentiary hearing was held before United States District Judge O'Conor, after which Judge O'Conor granted a preliminary injunction against the Defendants. However, Chief Justice Brown of the Fifth Circuit almost immediately stayed Judge O'Conor's preliminary injunction, without any opportunity whatever for young Niles to be heard.

After the stay from the Fifth Circuit, Judge O'Conor's preliminary injunction was subsequently dissolved by the Court upon Plaintiff's own motion as the ex parte stay

issued by Justice Brown in response to the Defendants' "Telex" motion for stay had permitted certain pressing events to transpire which wholly obviated the need for that particular preliminary injunction. Plaintiff Niles then amended his last pleadings as permitted by Judge O'Conor to reflect all of the relevant facts. The Defendants then moved to dismiss the suit pursuant to Rule 12(b)(1) and (6), F.R.C.P., and Judge O'Conor dismissed the cause by Final Judgment, coupled with his Memorandum and Order (Appendix "B").

As stated in detail within Plaintiff's last pleadings (Appendix "C" hereto) after this cause was filed and initially prosecuted by the Plaintiff, the Defendant governmental agency through at least two of its chief officers began an unlawful plan of coercion, retaliation, intimidation and punishment against young Niles directly and against his former guardian and his guardian's family (with whom young Niles resided). The purpose of the described malicious acts perpetrated by the named Defendants, among other things, ". . . was to punish Plaintiffs, Niles and Mattinson, and to wrongfully cause said parties to immediately cease prosecution of the suit, and to refrain from future participation therein in all ways." (Plaintiff's last amended complaint, Appendix "C" hereo).

REASONS FOR GRANTING THE WRIT

The defendant agency of the State of Texas through at least two of its chief officers, conspired to act and did in fact act under the color of State law to punish, intimidate, coerce and harass the young Plaintiff, Mark David Niles, and the family with whom he resided, because the said Mark David Niles and his appointed

guardian chose to file, testify in, and prosecute this suit against said agency and officers with vigor. Many of the detailed, factual assertions of such events are contained in Plaintiff's last amended complaint, "Appendix C" hereto, but such assertions of clear constitutional abridgements were given short shrift and ignored by the District and Circuit Courts below. In other words, Plaintiff was punished for exercising his rights of free speech and petition, and the right to pursue legal redress as guaranteed by the First and Fourteenth Amendments to the United States Constitution, and the Defendants sought to tortiously prevent said party from continuing to assert those rights. In so doing, the Defendants also violated 42 U.S.C. 1983, 42 U.S.C. 1985 and their jurisdictional counterpart, 28 U.S.C. 1343.

As in a summary judgment proceeding, the relevant pleadings of a plaintiff must be taken essentially as true where the defendant moves to dismiss the cause pursuant to Rule 12(b)(1) or (6), F.R.C.P. Evidentiary disputes or questions of fact are to be resolved wholly against the party that seeks to have the cause dismissed on the pleadings. *United States v. Diebold, Inc.*, 369 U.S. 654, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962); *Bell v. Hood*, 66 S.Ct. 773 (1946); *Vandenberg v. Newsweek, Inc.*, 441 F.2d 378, 379 (5th Cir. 1971); *DeLoach v. Crowley's Inc.*, 128 F.2d 378 (5th Cir. 1942).

Plaintiff's described causes of action are not constitutionally immaterial and his last pleadings state a strong case for federal redress as his protected constitutional rights have been ruthlessly violated by a local agency of government under color of state law. Though the District Court and Fifth Circuit may suffer from myopia

insofar as the Plaintiff's relevant rights are concerned, the arm of the United States Supreme Court is long enough and strong enough to keep open and unobstructed the way to its door to all who have lawfully invoked its protective authority.

Clearly, the young Plaintiff, David Niles, has stated a cause of action against the Defendants upon three separate grounds: (a) by reason of the District Court's inherent federal power to preserve its process and to prevent and rectify wrongful retribution taken against those who have appeared and would appear before it; (b) by reason of the fact that the Plaintiffs' allegations facially state a claim under 42 U.S.C. 1983, as the State's action complained of constituted an abridgement of Plaintiff's rights of free speech and petition within the framework of his lawfully pending action; (c) by reason of the fact that the Plaintiff's last pleadings facially state a cause of action under 42 U.S.C. 1985, as two or more defendants conspired to deter the Plaintiff through intimidation or threat from testifying in and pursuing his action, freely, fully and truthfully, and they did injure David Niles in his property and person on account of his having so attended and testified in this suit.

With respect to the first ground, it has been recognized from the very first days of the Supreme Court that:

> "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of the government is to afford him that protection . . ." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L.Ed. 60 (1803)."

As well stated by Judge Tenny, in *E.E.O.C. v. Locals 14 and 15 I.U.O.E.*, 438 F.Supp. 876, 879-880 (S.D. New York):

> "* * * Part of this duty of the government to provide the protection of law is that litigants and witnesses who appear before federal courts do so secure in the knowledge that they cannot be harassed, intimidated, punished or otherwise suffer harm because they availed themselves of the judicial system. See *Bell v. Hood*, 327 U.S. 678, 685, 66 S.Ct. 773, 90 L.Ed. 939 (1946); *United States v. Farrar*, 414 F.2d 936, 938 (5th Cir. 1969).
>
> *The insult that such retaliation against litigants or witnesses would produce goes beyond the injuries suffered by the individuals themselves;* the integrity of the court's process and proceedings suffers the inevitable and intolerable destruction that accompanies any retaliation against the witnesses.
>
> *Witnesses who lose work opportunities, suffer harassment, and are otherwise retaliated against because of their testimony,* are going to be much less likely to testify in a subsequent proceeding (which is very probable in this case) if such retaliation goes unchecked. This would affect both the Court—hindering its ability to hear the full story—and the EEOC—hindering it in prosecuting the case.
>
> The inherent power of a federal district court to prevent or remedy actions designed to or having the effect of deterring the use of the courts, or punishing one for such use, has been recognized and incorporated into the court's contempt power and its power under the All Writs Statute. 28 U.S.C. § 1651; *Pennsylvania v. Local 542, Int'l Union of Operating Engineers*, 347 F.Supp. 268, 286 (E.D. Pa. 1972). (emphasis added)

In *Shires v. The Magnavox Company*, 432 F.Supp. 231 (E.D. Tenn., 1976), Judge Neese said:

> Since the time of Blackstone wrote his commentaries, courts have guarded jealously against *any attempt to do any act to intimidate or to willfully or unlawfully prevent a person from instituting or prosecuting* a pending action in a court of record. This is deemed to be treating with disrespect the rules and processes of the court.
>
> The prevention of the appearance of a litigant in court for the prosecution of a suit brought to enforce a right, by intimidation and threats, is considered such an obstruction of judicial procedure as renders absolutely worthless all process of the court, which has been instituted for the enforcement and protection of the rights and the redress and the prevention of wrongs of the litigants. Such is held to destroy the dignity of the Court and to bring the administration of justice into disrepute * * * *The arm of the Court is long enough and strong enough to keep open and unobstructed the way to its door to all who must invoke its authority.* Justice cannot be administered properly if litigants are intimidated; any effort to thwart justice or to interfere with its orderly administration cannot be countenanced; courts must be free; and it is the duty of the Court to protect litigants, so that the orderly administration of justice shall not be impeded. *Wilson v. Irwin* (1911), 144 Ky. 311, 138 S.W. 373.
>
> Beyond the peradventure of a doubt, Mr. Barker's words and actions were intimidating and coercive of the plaintiffs Mr. Shires, Ms. Shires, and Mr. Ricker; he threatened in effect a cancellation of their respective franchise agreements with the manufacturer he represented *unless they discontinued this litigation.* The agreements with each such plaintiff

were in fact, terminated by Magnavox the following month. *This Court cannot condone such adversary tactics.*

Although Magnavox claims that it made no policy decision from the middle of 1975 through January of the following year to reduce the availability of its merchandise to the plaintiffs, and despite the fact that it was suggested on behalf of Magnavox that its employee Mr. Barker had a financial stake in promoting a settlement of this litigation, insofar as the litigating Plaintiffs are concerned, *the intimidation and the coercion were just as strong as they would have been* had these not been included in the circumstances extant.

This Court has the power to blunt the effect of Magnavox' tactics through the use of its inherent *equity power of injunction.* In *Wilson v. Irwin, supra,* the highest court of the commonwealth of Kentucky recognized the power of a trial court to employ this extraordinary device. There a preliminary injunction had issued on the application of Irwin restraining his neighbor, Wilson, from maintaining a dog kennel on his premises. During the pendency of that action, Wilson threatened to build a high fence between these neighbors' properties if he was required to move his dogs. Irwin persisted in his cause of action, and Wilson had a 20-foot high fence erected. When final judgment was entered, making the preliminary injunction permanent, Wilson *was enjoined mandatorily to remove the fence.* Affirming, the appellate court stated, *inter alia* ". . . It is insisted that Wilson had the right to build a fence on his own land, and built it as high as he pleased, *but he had no right to interfere with the administration of justice,* and he may be required to remove anything that was built to interfere with justice. * * *

The acts of Magnavox constitute a contempt, see 17 Am. Jur. 2d 18, Contempt, § 13; Anno.—Contempt—Forcing Withdrawal, 23 A.L.R. 187-189, certainly it forms a basis for the ordering of the mandatory reinstatement of the parties' franchise agreements until the issues herein *are finally determined.* This is true, especially when there is such a strong connecting relationship between the intimidation and the coercive threat of Magnavox' agent and the action Magnavox took *in refusing to deal further with the terminated plaintiffs.* The only reasonable inference from Magnavox' words and deeds is that they constituted acts *which tended directly to interfere unlawfully with this pending action and to impair the remedy and defeat the rights of the plaintiffs.* Cf. *Snow v. Hawkes, supra,* 183 N.C. 365, 111 S.W. 621, 23 A.L.R. at 186.

It is patent that the plaintiffs will be damaged irreparably if they are denied continued access to this Court to seek redress of the alleged wrongs *of Magnavox, they have no adequate remedy at law* to compel Magnavox to desist from such intimidative and coercive practices. On the other hand, Magnavox will not be the victim of a hardship if they are compelled to resume dealing with former dealers in their merchandise . . . The point for emphasis in this situation is that *this Court will not countenance the kind of attack shown by the evidence on the integrity of our judicial system.* For such reason, security of $1 will be required of the plaintiffs. Were some of the usual indicia supporting the issuance of an injunction absent, in order to vindicate the authority of this Court to keep its doors open to litigants for the redress of wrongs against them, the Court would have caused an injunction to issue.

The motion of the plaintiffs for a preliminary injunction hereby is GRANTED. (emphasis added)

As to the asserted violations of 42 U.S.C. 1983 and 42 U.S.C. 1985, the Petitioner says that his allegations clearly state several patent causes of action thereunder, and said party is entitled to his normal pretrial discovery and then to his final day in court to present and prove such to the federal trial court and jury.

The UIL, through Dr. Bailey Marshall and Dr. William Farney, have first attempted and finally succeeded in punishing and intimidating the plaintiff David Niles, for his rightful participation in this lawsuit. Such punishment was aimed directly at Mr. Niles and his legal guardian, Les Mattinson, as well as his guardian's family, in the form of all of the acts described in the relevant portions of the last complaint and acts yet to be presented to the District Court. Written records, kept in the normal course of business exist as evidence thereof, and witnesses will be called and will unequivocally testify in plaintiff's behalf on the entire subject. The UIL's punishment of the plaintiff's guardian, Les Mattinson, was calculated to vicariously intimidate David Niles as plaintiff in the case as David Niles resided with Mr. Mattinson, his guardian and friend, and was able in all ways, as a member of the Mattinson family, to view the anguish and damage caused to that family by the UIL's "blackball" treatment—all with utter impunity under the Fifth Circuit's ex parte stay and other rulings. When the Fifth Circuit stayed the District Court's injunction, the UIL believed itself to be above the law, as its invidious activities well spotlighted. The actions by the UIL and its officers constitute contempt of court as well as federal torts under the relevant law.

CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioner, Mark David Niles, requests that the Honorable Supreme Court grant a writ of certiorari to review the Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit, and to thereafter, in due course, reverse the cause and remand same to the District Court for all actions not inconsistent therewith.

Respectfully submitted,

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& FITZGERALD

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CERTIFICATE OF SERVICE

The undersigned attorney of record for Petitioner hereby certifies that he has on the 28th day of December, 1983, deposited a true copy of the foregoing Petition for Writ of Certiorari and the Appendices in the United States mail, certified, return receipt requested to each attorney of record for Respondents.

Anthony D. Sheppard

ANTHONY D. SHEPPARD

APPENDIX A

Mark David NILES,
Plaintiff-Appellant,

v.

The UNIVERSITY INTERSCHOLASTIC LEAGUE and The District III-17AAAAA Executive Committee, Defendants-Appellees.

NO. 83-2102

Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Sept. 30, 1983.

High school student had moved out-of-state to live with his mother during spring term, but subsequently returned to his former school and participated in varsity football the following fall. Executive committee of interscholastic league declared student ineligible to participate in football because of his prior absence from district, and student brought action challenging such determination. The United States District Court for the Southern District of Texas, Robert O'Conor, Jr., J., found no constitutional violation and held that it lacked subject matter jurisdiction of claim, and student appealed. The Court of Appeals, E. Grady Jolly, Circuit Judge, held that: (1) as student's allegations were not patently frivolous, ditsrict court had subject matter jurisdiction over claim; (2) rule requiring that student be resident of school district for at least one

year prior to participating in interscholastic events did not constitute impermissible burden upon student's right of travel or freedom of family association; (3) rule did not create invidious distinction between children residing with their parents and those residing apart from their parents; and (4) student's interest in participating in interscholastic sports fell outside protection of due process.

Affirmed.

Appeal from the United States District Court for the Southern District of Texas.

Before CLARK, Chief Judge, and RUBIN and JOLLY, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

I.

The plaintiff Mark David Niles was, in 1981, a student at Stratford Senior High School in the Springbranch, Texas, Independent School District. As a student, Niles participated in various activities, including intervarsity high school football and track. In the fall of 1981 Niles's mother, who had divorced in 1971 and who had been awarded custody of Niles, remarried and moved to California. Niles remained in Texas for the remainder of the fall academic term, however, and played varsity football. In late December 1981, Niles moved to California where he lived with his mother during the spring academic term. In early August 1982, Niles returned to Stratford Senior High School and participated in the football program. During fall 1982, Niles resided with Mr. Les Mattinson, who had been given legal guardianship by Niles's mother.

In November 1982, the Executive Committee of the University Interscholastic League declared Niles ineligible to participate in UIL interscholastic programs pursuant to Article 8 of the UIL constitution which, in essence, requires that a student be a resident of the school district for at least one year prior to participating in interscholastic events. In addition, UIL required Stratford Senior High School to forfeit all of the games in which Niles had participated up until that point. Niles initially obtained a temporary restraining order from the 270th District Court of Harris County, Texas, allowing him to participate in the final regular season football game and overruling the forfeiture of the previous games in which he had played. The following week, on November 11, 1982, Niles took a non-suit in the state court proceeding and that same day sought and received a temporary restraining order from Judge Cire of the United States District Court for the Southern District of Texas. One week later, after a hearing, the court granted Niles's motion for a preliminary injunction, which subsequently was dissolved upon a mutual motion by the parties.

The district court, Judge O'Conor, subsequently granted UIL's Motion to Dismiss the plaintiff's complaint, finding that it lacked subject matter jurisdiction. The court in a written opinion found that the constitution of the UIL does not violate the Due Process Clause in that the UIL constitution promotes legitimate state objectives of equalizing competition among participating schools. Further, the district court found that participation in high school football is not of sufficient interest under the Due Process Clause such that enforcement of Article 8 would impermissibly impinge upon a constitutionally protected right. The court found that Niles's fundamental right to travel

was only incidentally infringed upon by the UIL rules and that the imposition of the rules did not impermissibly burden the right to travel.

In filing his timely notice of appeal, Niles reiterates that the rules and constitution of the UIL, which are designed to prevent "school shopping," create a conclusive presumption regarding his intention of returning to Texas after having lived with his mother and have thereby denied him his rights under the Due Process Clause of the fourteenth amendment and the Texas state constitution by not affording him reasonable notice, hearing and an opportunity for a trial and appeal when his freedom to travel and right to earn a living were involved. Niles has further alleged that UIL's rules denied him his rights under the Equal Protection Clause of the fourteenth amendment by creating an invidious classification between students residing with their parents and those residing apart from their parents. Additionally, Niles alleges that the UIL rules impinge upon his right of family privacy, his right to have a guardian appointed, his right to visit his mother, and his right to travel.

II.

[1, 2] We start with the proposition that an allegation of improper denial by a state body of a student's right to participate in interscholastic athletics fails to raise a substantial federal question. *Mitchell v. Louisiana High School Athletic Assn.*, 430 F.2d 1155, 1157-58 (5th Cir. 1970). On the other hand, as stated, the plaintiff has alleged deprivation of various constitutionally protected rights, including the right to travel and freedom of family association. Unless it is determined that these asserted rights have been forwarded solely for the purpose of ob-

taining jurisdiction or are wholly insubstantial and frivolous, or unless we determine that such asserted rights are clearly immaterial to the case before us, then the district court cannot properly dismiss for lack of subject matter jurisdiction. *See Laurenzo v. Mississippi High School Activities Assn.*, 662 F.2d 1117, 1119-20 (5th Cir. 1981); *Walsh v. Louisiana High School Athletic Assn.*, 616 F.2d 152, 156-57 (5th Cir. 1980), *cert. denied*, 449 U.S. 1124, 101 S.Ct. 939, 67 L.Ed.2d 109 (1981). Viewing the pleadings in this light, we find that the lower court erred in determining that it lacked subject matter jurisdiction over the plaintiff's claims. We cannot say that the asserted denials of freedom of travel and freedom of familial choice are immaterial, since they are central to the plaintiff's case, nor are such assertions patently insubstantial or frivolous. In weighing the asserted rights against the state's legitimate aims in regulating interscholastic athletic activities, however, we find that the plaintiff did fail to state a claim upon which relief could be granted and therefore the action of the lower court in dismissing this case was, in the final analysis, correct.

Walsh is the primary authority on point in this circuit. In *Walsh*, the plaintiff Lutheran parents had brought an action on their own behalf and on behalf of their minor children growing out of the policy of the Louisiana High School Athletic Association which required a one-year residency within a high school zone in order for a child to participate in interscholastic athletic competition. None of the Lutheran elementary schools in New Orleans was located in the same district as the Lutheran high school, and therefore when a child was promoted from one of the Lutheran elementary schools to the Lutheran high school, he or she, by force of the Association's rules, had to sit

out of interscholastic competition for one year. The plaintiffs alleged that the force of the rule was to deny the plaintiffs their free exercise of religion.

[3] Noting that subject matter jurisdiction did exist, the court determined that the impingement of the rule upon the free exercise of religion was *de minimis*.

> It cannot be denied that, by imposing a cost on a parent's decision to enroll his children in Lutheran High School upon graduation from any of the seven Lutheran elementary schools in the metropolitan New Orleans area, the transfer rule places an indirect and incidental burden on the free exercise of the religious beliefs of these parents. The decisive issue is whether this indirect burden is an impermissible price to exact from these parents for the free exercise of their religious beliefs. We believe it is not.
>
> The encroachment of the transfer rule on the free exercise of religion is both limited in scope and insignificant in magnitude. The transfer rule does not deny these parents or their children the right to actively practice the Lutheran faith. Similarly, it neither prohibits a parent from enrolling his child in Lutheran High School nor interferes with the ability of such a child to obtain the religious education provided by that school. The rule merely prevents a child from participating in interscholastic athletic competition during his ninth-grade year.

616 F.2d at 158.[1]

1. *Laurenzo, supra,* involved essentially the same fact situation as the instant case, that is, the son of a recently divorced mother moved from his mother's home in Memphis, Tennessee, to live with his father in the former family home in Oxford, Mississippi. The pertinent Mississippi High School Activities Association rules precluded his participation in interscholastic high school sports because of a one-year residency requirement. Suit was brought asserting violation of the child's right to travel and his right to privacy, and

[4] In its order entered in this case dismissing the plaintiff's complaint, the district court found that the plaintiff's "fundamental right to travel freely is only incidentally infringed upon by these rules and [their] application does not constitute an impermissible burden upon such right," citing *Walsh*. That method of analysis is controlling in this circuit, and we find it applicable to the other asserted rights involved here. The plaintiff has not alleged that he could not travel to California to live with his mother should he desire to, nor has he alleged any proscription upon his ability to live with his guardian in Houston. Only the most incidental implication of the constitutionally protected rights are, or can be, asserted by the plaintiff here. Granted, the plaintiff could not travel back and forth between California and Texas *and* continue to take part in varsity interscholastic sports; as stated, however, no constitutional right exists to participate in interscholastic sports. Just as in *Walsh*, we hold the encroachment of the transfer rule on the right to travel and upon the freedom of family associations to be "both limited in scope and insignificant in magnitude." 616 F.2d at 158. The lower court determined correctly that the state's objective here was a legitimate one and was rationally related to the goal of equalizing competition among

---

asserting equal protection violations.

The district court dismissed for lack of subject matter jurisdiction. On appeal, we held that, under *Walsh*, the federal question which had been presented was not insubstantial and that the district court had subject matter jurisdiction. Because the case was moot, however, the appeal was dismissed.

We note here that, as in *Laurenzo*, Niles has graduated from high school, and mootness has been urged. Unlike the plaintiffs in *Laurenzo*, however, Niles has sought money damages. This case is therefore not moot. *Gulf Publishing Co. v. Lee*, 679 F.2d 44, 46 n. 2 (5th Cir. 1982).

competing schools in the UIL. Viewed thus, we find that the lower court correctly dismissed the plaintiff's claims.

[5] The plaintiff urges additionally that the UIL rules create numerous invidious distinctions, essentially between school-age children who reside with their parents and those who reside apart from their parents. A similar argument was forwarded in *Walsh*. We held there that, under *Parham v. Hughes*, 441 U.S. 347, 350-53, 99 S.Ct. 1742, 1745-46, 60 L.Ed.2d 269 (1979), and other authorities, "[w]here . . . the classification created by the regulatory scheme neither trammels fundamental rights or interests nor burdens an inherently suspect class, equal protection analysis requires that the classification be rationally related to a legitimate state interest." 616 F.2d at 160. As the court below correctly determined, the UIL rules promote the state's legitimate interest in equalizing competition. No equal protection violation is created thereby.

[6] As to the substantive due process claim asserted by the plaintiff, *Walsh* addresses this issue as well. In *Walsh*, this court held that while the Due Process Clause applies to fundamental rights giving rise to a " 'legitimate claim of entitlement,' " the Due Process Clause does not protect lesser interests or " 'mere expectations.' " *Walsh*, 616 F.2d at 159, quoting *Memphis Light, Gas & Water Division v. Kraft*, 436 U.S. 1, 9, 98 S.Ct. 1554, 1560, 56 L.Ed.2d 30 (1978). A student's interest in participating in interscholastic athletics falls "outside the protection of due process." *Mitchell*, 430 F.2d at 1158.

To repeat, the district court dismissed this case on the grounds that it lacked subject matter jurisdiction. We find that subject matter jurisdiction did exist, according to well established precedent of this court, but find further that

the claims were properly dismissed as failing to state a claim upon which relief could be granted. Forthrightly stated, the gravamen of the complaint here is the denial of the right to participate in interscholastic sports, not the rights to interstate travel, to earn a living or to live with or apart from one's family. These protected rights are unimpaired by the rule in question. Indeed, in cases such as this and *Walsh*, it would appear that such rights will rarely, if ever, be implicated so seriously as to state a claim upon which relief can be granted.

The district court's dismissal of this case is therefore AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-82-3387

MARK DAVID NILES

v.

UNIVERSITY INTERSCHOLASTIC LEAGUE and THE DISTRICT 17-AAAAA EXECUTIVE COMMITTEE

(Filed February 4, 1983)

FINAL JUDGMENT

For the reasons set out in this Court's Memorandum and Order of even date, it is hereby ORDERED, ADJUDGED and DECREED that the above-captioned cause of action is hereby DISMISSED for lack of subject matter jurisdiction.

Signed this 4th day of February, 1983.

/s/ ROBERT O'CONOR, JR.
Robert O'Conor, Jr.
United States District Judge

B-2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-82-3387

MARK DAVID NILES

v.

UNIVERSITY INTERSCHOLASTIC LEAGUE and THE DISTRICT 17-AAAAA EXECUTIVE COMMITTEE

(Filed February 4, 1983)

MEMORANDUM AND ORDER

Comes now before the Court for consideration Les Mattinson's Motion to Intervene (Rule 24, Fed. R. Civ. P), Plaintiff's Motion for Preliminary Injunction, Movant Les Mattinson's and Plaintiff's Motion for Contempt and for Preliminary Injunction, Defendants' Motion to Strike Plaintiff's Second Amended Original Complaint, and Defendants' Motion to Dismiss Plaintiff's Second Amended Original Complaint. After consideration of the motions, responses to the motions, and replies to the responses the Court issues the following order.

Plaintiff Mark David Niles ("Niles") has attended schools in the same zone within the Spring Brank Independent School District since he was in the fourth grade. Niles is presently a senior at Stratford Senior High School in the Spring Branch Independent School District. In the fall of 1981 Niles's mother remarried and moved to California. Niles moved in with Mr. and Mrs. Les Mat-

tinson for the remainder of the fall academic term. On December 22, 1981, Niles went to California to be with his mother for the Christmas holidays and the spring academic term. While he was in California he did not participate in any University Interscholastic League ("UIL") activities.

Niles returned to Houston to live with the Mattinsons on August 1, 1982. Les Mattinson was named and qualified as Niles guardian on August 9, 1982. Niles enrolled at Stratford Senior High School and participated in the varsity football program. On Friday, November 5, 1982 the District III - 17-AAAAA Executive Committee of the UIL, pursuant to Articles 8-14-1 and 8-14-2 and related portions of the Constitution of the UIL, declared Niles ineligible to participate in UIL programs and required Stratford Senior High School to forfeit all the games in which he had participated. Niles obtained a Temporary Restraining Order of the 270th District Court of Harris County, Texas in Cause No. 82-55043 and the connected writ issued on November 5, 1982 allowing him to participate in the final regular season game and preventing forfeiture of the games in which Niles had played. On November 11, 1982 Niles took a Non-Suit in the state court proceeding. Later, on November 11, 1982, Niles sought and received a Temporary Restraining Order from Judge Cire in the United States District Court, Southern District of Texas, Houston Division.

A hearing on Niles's Motion for a Preliminary Injunction was held on November 17, 1982 and the Court granted the Motion for Preliminary Injunction from the bench. On November 19, 1982, the United States Court of Appeals for the Fifth Circuit stayed the preliminary

injunction issued by this Court pending appeal of the order granting the preliminary injunction. On November 22, 1982 the UIL filed a Notice of Appeal of this Court's Order granting a preliminary injunction. On December 14, 1982, pursuant to an agreed Motion to Dissolve the Preliminary Injunction, this Court issued an order dissolving the preliminary injunction. The UIL filed a Motion to Dismiss the Appeal of the Preliminary Injunction with the United States Court of Appeals for the Fifth Circuit.

On December 16, 1982, Les Mattinson filed a Motion to Intervene. Niles filed a Motion for Preliminary Injunction to prevent the UIL from declaring Niles ineligible to participate in any UIL contest, including football and track and field. Niles also filed his Second Amended Original Complaint. Movant Mattinson and Niles also filed on December 16, 1982 a Motion for Contempt and for Preliminary Injunction to prevent the UIL from doing any act to punish, coerce, threaten, intimidate, or damage Mattinson or Niles as a result of their bringing suit against the UIL.

On December 30, 1982, the UIL filed a Motion to Strike Plaintiff's Second Amended Original Complaint and a Motion to Dismiss Plaintiff's Second Amended Original Complaint.

This Court is of the opinion that it lacks subject matter jurisdiction and thus the Complaint should be dismissed. Articles 8-14-1 and 8-14-2 and related portions of the Constitution of the UIL do not violate the due process clause of the fourteenth amendment since they are not wholly arbitrary and totally without value in the promotion of the legitimate state objective of equalizing compe-

tition among participating schools. *City of New Orleans v. Dukes,* 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976); *Kite v. Marshall,* 661 F.2d 1027 (5th Cir. 1982), *cert. den.,* 50 L.W. 3982. Also, participating in high school football is not a sufficient interest under the Due Process Clause of the Fourteenth Amendment such that Articles 8-14-1 and 8-14-2 would operate as an impermissible state invasion of a private realm of family life. *Prince v. Massachusetts,* 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed.2d 645 (1944), *Moore v. City of East Cleveland,* 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977).

Under equal protection analysis the articles in question only need to be rationally related to their legitimate purpose. *McGowan v. Maryland,* 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961); *Kite v. Marshall, supra; Karr v. Schmidt,* 460 F.2d 609 (5th Cir. 1972) (en banc). Plaintiff's fundamental right to travel freely is only incidentally infringed upon by these rules, and its application does not constitute an impermissible burden upon such right. *Walsh v. Louisiana High School Athletic Association,* 616 F.2d 152 (5th Cir. 1980), *cert. denied,* 449 U.S. 1124, 101 S.Ct. 939, 67 L.Ed.2d 109 (1981).

Since this Court lacks subject matter jurisdiction it is unnecessary to consider the outstanding motions. It is, therefore,

ORDERED that this cause be dismissed for lack of subject matter jurisdiction.

Signed this 4th day of February, 1983.

/s/ ROBERT O'CONOR, JR.
Robert O'Conor, Jr.
United States District Judge

APPENDIX C

Plaintiff's Last Amended Complaint

District Court Transcript, Pages 168-190.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-82-3387

MARK DAVID NILES,
Plaintiff

v.

UNIVERSITY INTERSCHOLASTIC LEAGUE and
THE DISTRICT III-17AAAAA EXECUTIVE
COMMITTEE,
Defendants

PLAINTIFFS' SECOND AMENDED
ORIGINAL COMPLAINT

To The Honorable Judge Of Said Court:

COMES NOW MARK DAVID NILES, Plaintiff and MR. LES MATTINSON, Plaintiff Intervenor and Co-Plaintiff in the above-styled and numbered cause and hereinafter sometimes referred to as "Niles and Mattinson", complaining of the UNIVERSITY INTERSCHOLASTIC LEAGUE and DR. WILLIAM FARNEY and DR. BAILEY MARSHALL and THE DISTRICT III-17 AAAAA EXECUTIVE COMMITTEE, Defendants herein and sometimes hereinafter collectively referred to as "Defendants", and said Plaintiffs file this their Second

Amended Complaint and state the following causes of action:

I.

Plaintiffs Niles and Mattinson herein are individual natural persons who are residents of Harris County, Texas, residing at 14546 Cindywood, Houston, Texas. Said residence is within the Spring Branch Independent School District, Harris County, Texas.

II.

This action is brought, and jurisdiction is founded upon, 42 U.S.C. Sec. 1983 and its jurisdictional counterpart, 28 U.S.C. Sec. 1343. Furthermore, jurisdiction is founded upon the inherent powers of the Court, as set forth in law. Additionally, Plaintiffs invoke the broad pendent jurisdiction of this Honorable Court to address, as necessary, the relevant tenets of Texas law, both constitutional and statutory, which permeate this cause. The relief sought is a declaratory judgment, appropriate interlocutory relief in equity and law, and a permanent injunction under the relevant Federal and State laws, and other relief as is necessary to maintain the patently lawful status quo pending final adjudication on the full merits.

III.

Defendant, THE UNIVERSITY INTERSCHOLASTIC LEAGUE and DR. WILLIAM FARNEY and DR. BAILEY MARSHALL may be served with the citation issued herein at the offices of the UNIVERSITY INTERSCHOLASTIC LEAGUE, located on the University of

Texas at Austin campus, 2622 Wichita Street, Austin, Travis County, Texas, zip code 78712, by serving Dr. Bailey Marshall, Director, UNIVERSITY INTERSCHOASTIC LEAGUE, and by serving Dr. Farney at the same address. The named persons are officers of the UIL. The UIL and Dr. Marshall have already appeared in this cause.

* * *

Defendant, UNIVERSITY INTERSCHOLASTIC LEAGUE, (hereinafter referred to as "UIL"), is a governmental agency and is an association of public schools throughout the State of Texas. . . .

* * *

IV.

The plaintiff, MARK DAVID NILES, earns excellent grades as an honor student in the Stratford Senior High School of the Spring Branch Independent School District of Harris County, Texas, and a member of the National Honor Society. He has participated in sports in the District during his Middle School and Senior High School years. He has attended the schools within the District and the same school zone as a student since the 4th grade level. He has legally resided in said District and zone since the 4th grade.

* * *

. . . After an evidentiary hearing, this Honorable Court entered a Preliminary Injunction on November 17, 1982 to maintain the status quo and duly protect the eligibility of Plaintiff, Niles, and further participation in the state playoffs, but the Fifth Circuit Court of Appeals, without

a hearing, stayed said protective injunction. Such stay did not serve the ends of justice, nor comport with the relevant law as to its conclusions. Therefore, all of the Defendants' invidious declarations and rulings hereinabove complained of, were allowed to stand, and Plaintiff's protected right to participate in said playoff game was wholly negated, along with the dependent rights of the Stratford team to so participate. The Fifth Circuit's action destroyed the lawful status quo and wrongfully worked to compromise the protected and lawful rights of the Plaintiff as an individual and his rights as a member of the team.

* * *

. . . The Defendants' operations, rules, regulations and proceedings are governed by the laws and Constitution of the United States and State of Texas, just as those of any other local governmental, or quasi-governmental entity in the State of Texas. *All Defendants operate and are compensated by tax dollars paid by the people from all parts of Texas.*

* * *

VI.

Defendants' actions are unlawful under the terms of 42 U. S. Code Section 1983, since such acts subject and cause Plaintiff to be subjected to, a deprivation of his rights, privileges and immunities secured to him by the Constitution of the United States, all under color of State law and the relevant rules and regulations. . . .

* * *

XI.

All conditions precedent to Plaintiff's cause of action have been complied with, and every requirement in fact and law for the issuance of interlocutory relief and eventually a permanent injunction and declaratory relief, herein exist and apply.

* * *

XIII.

Plaintiffs are entitled to recover against Defendants costs of Court and reasonable attorneys' fees incurred in this action, as authorized by 42 U.S.C. 1988 and other relevant law.

* * *

XV.

The Honorable U.S. District Court for the Southern District of Texas, Judge Robert O'Conor, Jr. presiding, held a hearing on November 17, 1982, beginning at approximately 2:00 o'clock p.m. in open Court, relevant to Plaintiff Niles' Motion For A Preliminary Injunction. As set forth in the record of said hearing, Plaintiff Les Mattinson testified as a witness for the Plaintiff Niles. As described above, said party's testimony was crucial to the Plaintiff, as Mr. Mattinson was David Niles' formal guardian, and was intimately involved in the factual history of this case as such developed in normal course. Mr. Mattinson's participation in the case was and will be calculated to serve the ends of justice, and has been and will be wholesome and forthright in all ways.

Mr. Mattinson, as party hereto, as a witness for Plaintiff, Niles, and in all other relevant capacities, is *protected under the law from,* coercion, retaliation, intimidation, sanctions, threats, punishments and any other such wrongful acts perpetrated against him by the Defendants or their privies. The Plaintiff, Les Mattinson, *since testifying in the above described hearing as aforesaid, has been the victim of and target for unlawful acts of retaliation, coercion, intimidation, unveiled threats and punishment perpetrated by the UIL and Dr. Bailey Marshall, acting unequivocally through Defendant, Dr. William Farney.*

* * *

Notwithstanding all of the above, including Mr. Mattinson's privileges and immunities under the United States Constitution and the other relevant laws of the land, *the UIL and Dr. Bailey Marshall, operating through Dr. William Farney, took unequivocal official action calculated to wrongfully outlaw and banish the Plaintiff,* Les Mattinson, from any participation to date as an official referee in the 1982 Texas high school football playoffs, and such calculated and malicious actions have had the intended effect in that regard. Such official action, under color of State law, was perpetrated with malice and was and is calculated to unlawfully outlaw and banish Mr. Mattinson as aforesaid. The setting of this entire action, with the patent backdrop of the UIL's unbridled governmental and quasi-governmental power, has furnished the ongoing ways and means for such nauseating defalcations to be perfectly effective in all ways.

* * *

The UIL, Dr. Marshall and Dr. Farney should have known and in fact knew that the described malicious

actions would be communicated to . . . Mr. Les Mattinson and David Niles, and such knowledge and sequence of calculated, punitive communication formed a significant facet of said Defendants' malicious plan to coerce, intimidate, threaten, retaliate against and punish Plaintiff Les Mattinson for his participation in the above styled and numbered lawsuit, and Plaintiff Niles for pursuing the lawsuit. The purpose of said described malicious acts, among other things, was and is to punish the Plaintiffs, Niles and Mattinson, and to wrongfully cause said parties to immediately cease prosecution of the suit, and to refrain from future participation therein in all ways.

* * *

Subsequent to the above described malicious acts, on or about December 5, 1982, the UIL and Dr. Marshall, operating through Dr. Farney, continued the above described retaliatory plan. . . .

* * *

The above described acts of the UIL and Dr. Marshall, committed through Dr. Farney *constitute contempt of the United States District Court.* Said actions were and are calculated by said Defendants to thwart and impede justice and to interfere with its orderly administration. The on-going purpose of the above described malicious, retalatory acts by Defendants was to punish Mr. Mattinson and vicariously, Mr. Niles. Additionally, as aforesaid, the said unlawful acts were calculated to cause said Plaintiffs to cease prosecution of this suit. In that regard, the Defendants' calculations have failed and shall continue to so fail.

* * *

Beyond any peradventure of doubt, the UIL and Dr. Marshall, acting through Dr. Farney, have intimidated and coerced numerous persons connected hereto, including the Planitiffs Niles and Mattinson. In fact, Mr. Mattinson was unlawfully and maliciously deprived of his opportunity preserved in law to participate in the subject games and earn a living as an official referee and to exercise his officially recognized talents in this field for the public good.

* * *

The above described acts of defalcation by said Defendants, have denied the Plaintiffs their rights under the Fourteenth Amendment to the U.S. Constitution, and constitute actionable abuse of office and official oppression against the Plaintiffs. Defendants enjoy no immunities from punishment herein, as said named officers constitute the highest policy making administrative officers of the UIL.

XVI.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that the UIL, Dr. Bailey Marshall and Dr. William Farney be enjoined from:

1. Doing any act of any nature calculated to cause, or causing Mr. Les Mattinson or Mr. David Niles to be punished, coerced, threatened, intimidated or damaged as a direct or indirect result of their bringing and prosecuting the above styled and numbered cause in the United States District Court, or as a direct or indirect result of their participation in said cause as a party, witness or in any other capacity whatsoever.

2. Doing any act of any nature calculated to cause, or causing any person, group or entity to be punished, coerced, threatened, intimidated or damaged as a direct or indirect result of the above styled and numbered suit and any association or connection such person, group or entity has with Mr. Les Mattinson and Mr. David Niles.

* * *

6. Award Plaintiffs their damages, actual and punitive and reasonable attorneys' fees, costs of Court and such other and further relief as this Court may deem proper.

Respectfully submitted,

HOFHEINZ, HARPOLD,
McDONALD & FITZGERALD

By: /s/ LEW W. HARPOLD
Lew W. Harpold
State Bar No. 09035000

By: /s/ ANTHONY D. SHEPPARD
Anthony D. Sheppard
Texas Bar No. 18226000

One Greenway Plaza East
Suite 820
Houston, Texas 77046
(713) 626-8060

Attorneys for Plaintiff

* * *

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day personally appeared MARK DAVID NILES, who, being by me duly sworn, upon his oath deposed and said that all of the statements of fact concerning the said MARK DAVID NILES and his family stated in the above and foregoing Plaintiff's Original Complaint are true and correct.

/s/ DAVID NILES
Mark David Niles

WITNESS MY HAND AND SEAL OF OFFICE this 14th day of December, 1982.

/s/ ANTHONY D. SHEPPARD
Notary Public in and for
The State of Texas

My Commission Expires:
4/13/85

/s/ ANTHONY D. SHEPPARD
Printed Name of Notary Public

(S E A L)

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day personally appeared LES MATTINSON, who, being by me duly sworn, upon his oath deposed and said that all of the statements of fact concerning the said MARK DAVID NILES and his family stated in the above and foregoing Plaintiff's Original Complaint are true and correct.

/s/ LES MATTINSON
Les Mattinson

WITNESS MY HAND AND SEAL OF OFFICE this 14th day of December, 1982.

/s/ ANTHONY D. SHEPPARD
Notary Public in and for
The State of Texas

My Commission Expires:
4/13/85

/s/ ANTHONY D. SHEPPARD
Printed Name of Notary Public

(SEAL)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was placed in the hands of a professional delivery service for delivery to all interested counsel on this 16th day of December, 1982.

/s/ LEW W. HARPOLD
Lew W. Harpold

* * *

Office-Supreme Court, U.S.
FILED
JAN 27 1984
ALEXANDER L. STEVAS,
CLERK

NO. 83-1101

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

MARK DAVID NILES,

Petitioner

VS.

THE UNIVERSITY INTERSCHOLASTIC LEAGUE, ET AL.

Respondents

BRIEF IN OPPOSITION

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Attorneys for Respondents

QUESTIONS PRESENTED

1. Has Petitioner's cause of action become moot?

2. Has Petitioner stated a cause of action upon which relief can be granted?

PARTIES TO THE PROCEEDING

The Petitioner is:
Mark David Niles

The Respondent is:
The University Interscholastic League

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

LIST OF AUTHORITIES iv

OPINIONS BELOW 1

MOOTNESS 1

HAS THE PETITIONER STATED A CAUSE OF ACTION UPON WHICH RELIEF CAN BE GRANTED? . 2

REASONS WHY THE WRIT SHOULD BE DENIED 3

CONCLUSION 4

CERTIFICATE OF SERVICE 4

LIST OF AUTHORITIES

CASE	PAGE
Allen Calculators v. National Cash Register Co., 322 U.S. 137 (1944)	3
Golden v. Zwickler, 394 U.S. 103 (1969)	2
Kite V. Marshall, 661 F.2d 1027 (5th Cir. 1982), cert. den., 457 U.S. 1120 (1982)	3
Korioth v. Briscoe, 523 F.2d 1271, (5th Cir. 1975)	3
Mitchell v. Louisiana High School Athletic Association 430 F.2d 1155 (5th Cir. 1970)	3
Roe v. Wade, 410 U.S. 113 (1973)	2
SEC v. Medical Committee for Human Rights, 404 U.S. 183 (1972)	2
U.S. v. Munsingwear, Inc., 340 U.S. 36 (1950)	2
Walsh v. Louisiana High School Athletic Association, 616 F.2d 152 (5th Cir. 1982), cert. den. 457 U.S. 1120 (1982)	3

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Respondents

BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The University Interscholastic League (UIL) files this Brief in Opposition to the Petition for Writ of Certiorari.

OPINIONS BELOW

1. The opinion of the District Court is not reported but appears as Appendix "B" in the Petition for Certiorari.

2. The opinion of the Court of Appeals is reported in 715 F.2d 1027.

MOOTNESS

This lawsuit was originally brought by Mark David Niles in the District Court for the Southern District of Texas. Subsequently a Motion to Intervene was filed by Les Mattinson; a motion to disallow this intervention was

filed by the Respondent, but neither motion was ruled on by the District Court. After several preliminary skirmishes the District Court entered a Final Judgment dismissing the cause of action for lack of subject matter jurisdiction. The Court of appeals affirmed the judgment, but based its affirmation on the proposition that "the Plaintiff did fail to state a claim upon which relief could be granted...". The purported intervenor, Les Mattinson, is not a party to the Petition for Certiorari; this was not a class action.

The record reflects that, at the time of the filing of this lawsuit in November, 1982, Niles was a Senior student in high school. Niles graduated in May, 1983, thereby rendering his lawsuit moot.[1]

An actual controversy must exist at stages of Appellate or Certiorari review, and not simply at the date that the action is initiated. *Roe v. Wade*, 410 U.S. 113 (1973); *SEC v. Medical Committee for Human Rights*, 404 U.S. 403 (1972); *Golden vs. Zwickler*, 394 U.S. 103 (1969); *U.S. v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

Since there is not a viable Plaintiff to prosecute this lawsuit, Petitioner has failed to invoke the jurisdiction of this Court; the lawsuit is moot.

HAS THE PETITIONER STATED A CAUSE OF ACTION UPON WHICH RELIEF CAN BE GRANTED?

The Court of Appeals correctly held that

> "Forthrightly stated, the gravamen of the complaint here is the denial of the right to participate in in-

1. Respondent contends that the lawsuit became moot even before Niles' graduation for the reason that he was no longer enrolled in any Texas High School for which he desired to participate in Texas interscholastic activities, having again moved to California.

terscholastic sports, not the rights to interstate travel, to earn a living or to live with or apart from someone's family. Indeed, in cases such as this and *Walsh*, it would appear that such rights will rarely, if ever, be implicated so seriously as to state claim upon which relief can be granted."

REASONS WHY THE WRIT SHOULD BE DENIED

The writ should be denied, first, for the reason that the cause is now moot. Second, the cases are clear that the right to participate in interscholastic athletics does not rise to constitutional heights. *Kite v. Marshall*, 661 F.2d 1027 (5th Cir. 1982), cert. den., 457 U.S. 1120 (1982); *Walsh v. Louisiana High School Athletic Association*, 616 F.2d 152 (5th Cir. 1980), cert. den. 449 U.S. 1114, (1981), *Mitchell v. Louisiana High School Athletic Association*, 430 F.2d 1155 (5th Cir. 1970).

Although the Petitioner moved for leave to allow an intervention, such leave was never granted by the District Court. Judgment was renderd by the District Court dismissing the lawsuit; this judgment was affirmed by the Court of Appeals. Upon dismissing the Plaintiff's complaint, the Distict Court held that in view of such dismissal, it was unnecessary to pass upon the outstanding motions, including the motion for leave to intervene. Thus, the intervention was never consummated. The would-be intervenor alleged facts which, if true, would constitute a seperate and distinct cause of action. If the failure of the District Court to rule on such motion was tantamount to a denial, no clear abuse of discretion is apparent; the exercise of discretion in refusing a motion to intervene is not reviewable unless a clear abuse of discretion is shown. *Allen Calculators vs. National Cash Register Co.*, 322 U.S. 137 (1944). Also see *Korioth vs. Briscoe*, 523 F.2d 1271, 5th Cir. (1975).

CONCLUSION

The Petition for Writ of Certiorari should be denied because the opinion of the Court of Appeals for the Fifth Circuit is correct, and for reasons set out in this brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert W. Gauss, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of Respondents' Brief in Opposition has been served upon counsel for the Petitioners by placing same in the United States mail, certified, return receipt requested, addressed to Anthony D. Sheppard, One Greenway Plaza East, Suite 820, Houston, Texas 77046 on this the _____ day of January, 1984.

ROBERT W. GAUSS

Office - Supreme Court, U.S.
FILED
FEB 9 1984
ALEXANDER L. STEVAS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NO. 83-1101

MARK DAVID NILES,
Petitioner

versus

THE UNIVERSITY INTERSCHOLASTIC LEAGUE, et al.,
Respondents

PETITIONER'S REPLY

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SUBJECT INDEX

	Page
ISSUE OF ALLEGED MOOTNESS	1
ALLEGED ISSUE OF PARTIES	2
CONCLUSION AND PRAYER	3
CERTIFICATE OF SERVICE	4

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THE UNIVERSITY INTERSCHOLASTIC LEAGUE, et al.,
Respondents

PETITIONER'S REPLY

To The Honorable Supreme Court of the United States:

Petitioner, Mark David Niles, hereby replies to the Respondents' Brief in Opposition as follows:

ISSUE OF ALLEGED MOOTNESS

The Defendants raised the issue of mootness in the Circuit Court below and that Honorable Court correctly disposed of it by footnote as set forth in Petitioner's Appendix A herein at the bottom of page A-7, to-wit:

> ". . . Niles has graduated from high school, and mootness has been urged . . . Niles has sought money damages. This case is therefore not moot."

Furthermore, the young Petitioner has sought attorney's fees as allowed in law, and injunctive relief based upon

the Plaintiff's claims was granted by the District Court and such action by the trial court was in all ways correct. Petitioner's causes of action are patently not moot.

ALLEGED ISSUE OF PARTIES

Respondent's Opposition filed herein does not address the facially urgent issue before the Honorable Supreme Court. The Petitioner, David Niles has stated Federal causes of action and the Co-Plaintiff, Mr. Les Mattinson has done as well. The Honorable District Court simply dismissed the whole cause via his summary order, as he erroneously believed he had no power to hear any portion of the case. The Court of Appeals, after conceding jurisdiction, did not remand the case for further action because the Panel was of the erroneous opinion that the Plaintiffs had failed to state any Federal causes of action, whatever, even under the obvious assumption, that all of the sworn allegations of the Plaintiffs' last complaint were true. Justice Jolly was in error when he and his Honorable Panel issued the ex parte stay of the Trial Court's preliminary injunction and he was wrong in the conclusions set forth in his opinion for the ruling Panel challenged at bar. When this case is duly reversed and remanded to the Honorable District Court for all action not inconsistent therewith, the Plaintiff, Les Mattinson, will be taken out of his present state of technically conjured limbo and allowed to proceed with young Niles to prove their causes by a preponderance of the evidence as allowed in law. The Petitioner, Niles, and the Co-Plaintiff, Les Mattinson, have both stated Federal causes of action herein under oath, and none of the cases cited by the Respondents favor the apparently urged "Catch 22" as to both such proper parties.

Furthermore, Respondents are apparently asserting obliquely through their list of interested parties that other duly named and appearing Defendants are not before the Honorable Supreme Court. All of the named Defendants have not appeared by written answer in the District Court because The Motion to Dismiss filed in lieu of Defendants' answer was erroneously granted, but Federal causes of action have been rightfully asserted herein against all named Defendants, and they are all obviously before the Honorable Supreme Court whether duly listed herein by the opposition or not.

CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioner, Mark David Niles, requests that the Honorable Supreme Court grant a writ of certiorari to review the Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit, and to thereafter, in due course, reverse the cause and remand same to the District Court for all actions not inconsistent therewith.

Respectfully submitted,

HOFHEINZ, HARPOLD, MCDONALD
& FITZGERALD

LEW W. HARPOLD

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CERTIFICATE OF SERVICE

The undersigned attorney of record for Petitioner hereby certifies that he did on the 8th day of February, 1984, deposit a true and correct copy of Mark David Niles' Reply, above set forth, in the United States Mail, certified mail, return receipt requested to each attorney of record for Respondents, named herein as follows:

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WITNESS MY SIGNATURE this 8th day of February, 1984.

ANTHONY D. SHEPPARD